Newsletter of the Utah Prosecution Council

The PROSECUTOR

RECENT CASES

United States Supreme Court

Strip search of student is unconstitutional

Savana Redding was a 13-year-old student attending eighth-grade in 2003. Following up on information from another student, Assistant Principal Kerry Wilson called Redding into his office to confront her with pills he'd confiscated from the other student. Redding denied the pills were hers and agreed to Wilson searching her belongings. Wilson found nothing but sent her with his female assistant to the nurse's office so she could be searched. The female nurse and assistant had Redding remove her outer clothing. Redding was then required to pull her bra and panties away from her body to see if any pills fell to the floor. In doing so, she had to expose her breasts and pelvic area in the presence of the nurse and assistant. No pills were found. Redding's mother sued the school district, however, the district court ruled in favor of the defendants. Initially the Court of Appeals for the Ninth Circuit affirmed the ruling. Subsequently, the en banc Ninth Circuit reversed, holding that Redding's Fourth Amendment rights were violated. Certiorari was granted.

The Supreme Court relied on *New Jersey v. T.L.O.*, in which the Court held that a school search must be "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." It reasoned that the risk posed by the suspected possession of ibuprofen did not justify the intrusiveness of searching inside the bra and underwear. Accordingly, it held that the strip search violated the rule of reasonable suspicions for school searches. The Court further found that since "the lower courts have reached divergent conclusions regarding how the T.L.O. standard applies" to strip searches, qualified immunity should apply to the school officials. *Safford Unified School Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009).

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LEGAL BRIEFS

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No constitutional due process right for post-conviction DNA testing

On March 22, 1993, William Osborne and Dexter Jackson solicited sex from a female prostitute, K.G. After arriving at a deserted location K.G. demanded payment in advance. The men pulled out a gun and forced her to perform at gunpoint. She was then ordered to lie facedown in the snow. Afraid for her life, she refused and the two men strangled her and beat her with the gun. K.G. tried to run away but was caught, beaten with an axe handle and shot in the head while she lay on the ground. They kicked snow on top of her and left her for dead. Miraculously, K.G. survived. Six days later, Jackson was pulled over and police discovered a gun as well as several of K.G.'s belongings. Jackson admitted to being the driver and identified Osborne as the passenger. Osborne was convicted of kidnapping, assault and sexual assault. Osborne sought post conviction relief in state court on the basis of ineffective assistance of counsel because his attorney did not have a particular DNA test done on sperm collected at the crime scene. The state denied relief. Osborne then filed in federal court requesting an order to compel the district attorney's office to give him access to the evidence so he could have the DNA tests performed at his own expense. The district court granted the order and the appellate court affirmed.

The United States Supreme Court held that Osborne did not have a right, under the Due Process Clause of the Fourteenth Amendment, to access the evidence. The Court found that a "freestanding" federal due process right of access to evidence did not exist. Furthermore, it held that the process provided by states for inmates to seek access to evidence was adequate and any additional relief was best left to Congress and state legislatures. Accordingly, it held that the court of appeals erred when it granted Osborne the post conviction right to material exculpatory evidence under *Brady*. Reversed and remanded. *DA's Office v. Osborne*, 129 S. Ct. 2308 (2009).

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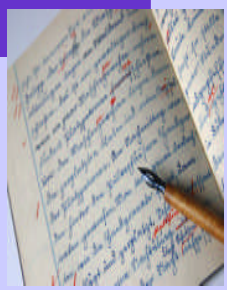

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Tenth Circuit Court of Appeals

Shooting in the direction of another is a 'Violent Felony' and qualifies for ACCA enhancement

Alex Joe Hernandez was convicted of deadly conduct, under the Texas Penal Code, for firing a gun at or in the direction of another person. The district court applied the Armed Career Criminal Act (ACCA), at 18 USC §924(e), for purposes of a sentencing enhancement. Under the ACCA a 'violent felony' includes a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another." On appeal, Hernandez argues that his deadly conduct convictions do not constitute a violent felony.

The Tenth Circuit applied the "modified categorical approach" and determined that Hernandez was convicted of a qualifying offense. The court reasoned that "discharging a firearm at or in the direction of an individual necessarily involves at least the threatened use of power, violence, or pressure directed against that person." In accordance with that "real threat, " the court held that the statute was satisfied and any argument that the action did not involve a threat lacked merit. The district court's application of the ACCA enhancement was affirmed. *United States v. Hernandez*, 568 F.3d 827 (10th Cir. 2009).

Good faith exception applied to pre-*Gant* evidence otherwise subject to suppression under *Arizona v. Gant*

An officer saw McCane driving his car and straddling the lane divider lanes. The officer stopped McCane, suspecting that he was impaired. McCane told the officer that his drivers license was suspended. After confirming the license suspension, the officer arrested McCane, handcuffed him and placed him in the back seat of the patrol car. The officer also directed a passenger to get out of the car. The officer searched the car incident to the arrest and found a loaded handgun in the driver side door pocket. Upon seeing the gun, McCane said, "I forgot that was even there." McCane was charged with being a felon in possession of a handgun. A motion to suppress the gun was denied by the trial court. While the case was on appeal to the Tenth Circuit Court of Appeals, the Supreme Court issued its decision in *Arizona v. Gant*. *Gant* held that a vehicle search is not valid as incident to a lawful arrest when a defendant is stopped for a traffic violation and handcuffed in the back of the patrol car at the time of the search. Under the rule of *Gant*, the gun found next to McCane's seat should have been suppressed. However, the court stated, "we agree with the government that it would be proper for this court to apply the good-faith exception to a search justified under the settled case law of a United States Court of Appeals, but later rendered unconstitutional by a Supreme Court decision."

In applying the good faith exception, the court relied on another recent Supreme Court decision, *Herring v. United States*, ---U.S. ----, 129 S.Ct. 695 (2009). In *Herring*, the Supreme Court held that evidence obtained in a search incident to arrest based on a warrant later found to be recalled should not be suppressed. The Supreme Court stated that, "evidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." In this case, the officer was relying on legal principles taught for decades following the decision in *New York v. Belton*, 453 U.S. 454 (1981). The deterrence principle, repeatedly articulated by the Supreme Court, could have no application because the officer was relying on well-established law. This decision is binding on federal courts in the Tenth Circuit, and is certain to influence state courts and other federal courts that are facing similar issues in the wake of *Arizona v. Gant*. *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009).

Qualified immunity denied for officers who detained and handcuffed possible witness

An officer received information that Manzaneres could help the officer to locate a rape suspect. Two officers went to Manzaneres's home. Manzaneres invited the officers into his home and was generally cooperative. When Manzaneres told the officers that he could not provide the last name or address of the suspect and officers pressed him, he asked the officers to leave. They did not leave. Instead, they handcuffed Manzaneres and placed him in the back seat of a patrol car for several hours so that he could not communicate. He was not released until after officers located an

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PROSECUTOR PROFILE

PREFERRED NAME - Clint

BIRTHPLACE
Salt Lake City, Utah

FAMILY
Married and father of two children ages 2 mos and 2 years
He is the third child of four children

PETS
White boxer… and apparently a snake that lives in the garage!

FIRST JOB
Window blind installer

FAVORITE BOOK
Wild Swans by Jung Chang
Highly recommended

LAST BOOK HE READ
Wild Swans by Jung Chang

WORDS OF WISDOM
Always, ALWAYS, use hand sanitizer when you come back from a law and motion court day!

Clinton Drake,

Assistant City Prosecutor/Acquisition Specialist

One can only say that Clint is the hero of the day. When, at the eleventh hour, the prosecutor to be profiled went incognito and threw the newsletter editor into a panic, Clint came through with only a few hours notice. That alone tells you the kind of man that Clint Drake is! So thank you Clint!

Clint has worked at Layton City for two years as an assistant to the city prosecutor and a property acquisition specialist. He willingly put on both hats and does an excellent job at both. Clint graduated from Weber State University in 2002 with an undergraduate degree in Public Relations and Journalism, and a minor in History. He was inspired by a couple of professors at college to go to law school and that interest was further enforced by his association with several attorneys and law students that he had the opportunity to work with in Washington, D.C. Clint attended Drake University, and yes, he did have to pay tuition. He recalls as a child that he and his two other brothers had a basketball hoop hung in their room that they could shoot hoop with and it had Drake University on the backboard. His parents thought it was cute and given the family name it was certainly appropriate. Once his professional basketball dreams dissipated with age and wisdom, it seemed like a great school to attend and so he did. He graduated in 2006. His career path towards prosecution began the summer of his second year in law school when he had the choice between working at a law firm or as an intern for a county attorney's office. He chose the prosecution internship. His assignment was to prosecute the misdemeanor docket for the county. The day he started he was shown his desk, shown where the files were, handed a stack of cases and told, "These are your trials for today, let me know if you have any questions!" Since then, he's never doubted that he made the right choice.

Clint's favorite team is the Cleveland Browns, sort of a self-induced depression but he's devoted nonetheless. He's also a BYU football fan, but don't hold that against him! He loves all types of music, Pink Floyd, Elvis Presley, and is currently exploring and enjoying the pre-Beatle era oldies (1957-1964). If money is no object, he loves sushi and Chicken Tikka Masala. When he's looking for a snack he pulls out the Red Vines. For couch entertainment Clint watches Lost and The Office. He's quite a world traveler, having been to China, the Philippines, England, France, Monaco and Mexico. There are many places he still wants to visit but to name a couple, he hopes to go to Russia, because he studied Russian history in college, Vietnam and return to the Philippines. No doubt the vast riches he's acquiring by working for government will help him fulfill his travel dreams!

Clint loves prosecuting and takes great satisfaction in seeing the 'bad guy' go away for a while. Each day is different and that keeps his interest high. The downside to his job is that he's much more careful or perhaps even a bit paranoid when out on the town with his wife and children. He really dislikes running into defendants when he is with his family. He even confesses that on more than one occasion he has walked into a restaurant, noticed who was cooking and walked right back out. But, as a whole, the job is incredibly rewarding and sometimes downright humorous. Once in the middle of a trial, Clint recalls that the defense counsel suddenly broke down into tears, told the judge he "couldn't do this" and stormed out of the courtroom. It was one of Clint's first trials and he just sat there looking at the judge with a look of astonishment on his face. The only problem was that she had the same look on her face! He would like to think that the outburst was due to his amazing trial techniques that he'd picked up from Law and Order, but in reality, the defense counsel was too emotionally involved in the case. He did eventually return and finished the trial. It's one thing to make a witness cry, but a defense attorney? Way to go Clint!

The most important qualities of a good prosecutor, in Clint's opinion, is to be fair and just. These are qualities he works daily to aspire to and succeeds. Clint is easy and enjoyable to work with and a valued part of the Layton City team.

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address for the suspect through other sources and arrested him. Manzaneres sued, claiming that the officers remained in his house without legal authority and that they illegally detained him. The officers asserted that Manzaneres was being detained in connection with an investigation into his alleged obstruction of an officer, or alternatively, as a witness. A jury found in favor of the officers.
The court of appeals reversed the jury verdict and held that the officers "could not have reasonably believed that Manzanares had resisted, evaded, obstructed, or refused to obey an officer within the meaning of either of the relevant provisions of New Mexico law."

Courts allow a brief detention of a witness for information or to prevent interference in an ongoing investigation. The court explained: "Because the detention here occurred inside a home, it was unquestionably unconstitutional unless supported by probable cause." The court held that there was no probable cause to believe that Manzaneres would interfere with the investigation. The officers' "unsubstantiated hunch cannot constitute probable cause." Thus, the detention inside the home was unconstitutional once Manzaneres withdrew his consent for the officers to be inside the home. A consensual entry and/or encounter is "limited by the scope of consent given." The court held that the officers were not entitled to qualified immunity from suit because a reasonable police officer would know that his presence in Manzaneres's home after Manzaneres withdrew his consent would be plainly illegal. Even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within a home, police may not enter without a warrant absent exigent circumstances." Thus, the court held that the officers were liable as a matter of law and remanded the case for a new trial solely on the issue of damages to be paid to Manzaneres. *Manzanares v. Higdon*, --- F.3d ----, 2009 WL 2430643 (10th Cir. 2009).

Brady violation inquiry is based on whether the defendant was prejudiced by the timing of the disclosure

Kenneth Burke was convicted by a jury of conspiring to possess with intent to distribute and to distribute, methamphetamine, and of maintaining a drug house. At trial, Burke objected to the testimony of a cooperating witness who revealed evidence of an informal plea agreement. Burke argued that the tardy disclosure of evidence, regarding an informal plea agreement reached between the government and the witness, was a Brady violation. He moved the court to strike the witness and overturn the suppression of the impeachment of the witness. The motion was denied. Burke appealed.
Although the Tenth Circuit acknowledged that a belated disclosure of exculpatory or impeachment evidence could give rise to a Brady violation, it concluded that Burke failed to provide any basis for a finding that he had been prejudiced by the delay and that his due process rights were violated. It reasoned that lacking any information to support a claim of prejudice sufficient to exclude the testimony of the witness, the trial court had not erred in its conclusion that the issue of bias could be handled during cross-examination. Since the evidence was revealed prior to the conclusion of the trial, Burke's argument that the disclosure altered his trial strategy was forfeited. He had sufficient opportunity to cross-examine and include the evidence in his own case, as well as in his closing argument, in support of reasonable doubt. The court also held that any Sixth Amendment violation for suppressing the cross-examination of the witness was harmless error. District court judgment affirmed. *United States v. Burke*, 571 F.3d 1048 (10th Cir. 2009).

Utah Supreme Court

Soliciting, seducing, luring, or enticing a minor to engage in unlawful sexual activity does not require a meeting.

James Gallegos entered a chat room and made contact with an undercover police officer who was posing as a thirteen year old girl named, Chantel. During the initial contact she disclosed her age. Gallegos told her he was 28 years old and too old for her.

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Approximately a week later, Chantel entered the chat room a second time and Gallegos again made contact with her. This time their conversation became sexually graphic and ended in an agreement to meet at a nearby school to engage in sexual activity. At the time of the agreed meeting, several officers were posted nearby and observed Gallegos driving slowly by the school. He returned and drove by twice more, but then apparently saw some of the officers and sped away. Police made contact with him in his apartment parking lot, pulled a vehicle in behind his, and surrounded him. When asked where his computer was, Gallegos responded that he'd thrown it away. Officers read him his Miranda rights, after which he invoked the right to remain silent and to obtain an attorney. He was arrested and booked into jail. Motions were filed, but all were granted in favor of the State. Convictions were entered for two counts of enticing a minor over the internet. Gallegos appeals the convictions, alleging several errors and claims the totality of the damage resulting from the errors justifies a remand for new trial or vacation of his sentence. His arguments include: the criminal statute is unconstitutionally vague, the trial court erred by not allowing him to present a voluntary termination affirmative defense, it erred by denying his motion to suppress statements he made regarding the destruction of his computer and it erred by excluding his proposed expert testimony.

The Utah Supreme Court held that the statute was not unconstitutionally vague because nothing in the statute requires a meeting to have occurred for the offense to be complete. Instead, if the "solicit [ing], seduc[ing], lur[ing], or entic[ing]" of a known minor to actually *engage* in unlawful sexual activity occurs, the offense is complete and such conduct is not protected under the First Amendment. The court noted that it is simply easier to prosecute persons who have engaged in the enticement who actually arrange a meeting. Accordingly, the voluntary termination instruction was inapplicable. The court further held that the questioning as to the location of the computer should have been suppressed because the officer should have known a response to the questioning was likely to elicit an incriminating response. However, the inclusion of the statements at trial was harmless in light of all the other evidence of guilt. And finally, the court held that the trial court erred in excluding the expert testimony because under rule 404(a)(1) of the Utah Rules of Evidence, Gallegos can introduce "pertinent" or relevant character trait evidence. Nonetheless, this error was also deemed harmless given the totality of evidence before the court. "Because two of the alleged errors were not in fact errors and because the remaining two errors do not rise to the level of cumulative error, Gallegos' cumulative error challenge also fails." Affirmed. *State v. Gallegos*, 2009 UT 42.

Prosecution office should have been disqualified from prosecuting defendant on presumption of shared confidences.

Carl McClellan's was convicted of first-degree rape. The crime occurred on July 5, 1988, when he entered the victim's house as a door-to-door salesman. He was at the home at or about 1:00 p.m. and then again around 4:00 p.m. The rape occurred during the 1:00 p.m. encounter. The victim reported the rape to police later that same day and McClellan was arrested a few days later. During the police interview, McClellan claimed to only have been at the home once, however, after police questioned him further he admitted he lied and confirmed that he had been there twice. Unbeknownst to McClellan, the interrogation was recorded. Phil Hadfield represented McClellan at his preliminary hearing and arraignment. Trial was set. Three days before trial, McClellan appeared on a defense motion for a continuance. At that time, McClellan learned that Hadfield had left his defense practice and joined the staff of the Utah County Attorney's Office, the same office that was prosecuting him. McClellan was assigned new counsel, James Rupper, who sought the continuance in an effort to be properly prepared for trial. However, when McClellan was advised that a continuance would require him to waive his right to a speedy trial, he refused. The trial proceeded on August 29, 1988. During the trial the taped interrogation was introduced. Despite the objections of the defense, that they had not previously been made aware of the tape, it was admitted. The court allowed time for the viewing of the tape before questions continued the following day. McClellan was ultimately convicted.

Over the course of the next 21 years, various attorneys represented McClellan and numerous motions and appeals were filed. Errors, oversights, and egregious mismanagement of the case over that course of time resulted in a resentencing, nunc pro tunc, in October 2005. The original sentence was reimposed and all other post-trial motions were denied. McClellan again

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appealed, claiming that the Utah County Attorney's Office should have been disqualified from prosecuting him and that the recording of his interrogation should not have been admitted as evidence. The court of appeals denied both claims and affirmed his conviction. Certiorari granted.

The Utah Supreme Court held that the trial court erred in failing to disqualify the Utah County Attorney's Office from prosecution of this case based on the presumption of shared confidences. Even though 20 years had passed, McClellan was still entitled to a fair trial, which he had not received. It also held, that having remanded the case for a new trial, the claim regarding the taped interrogation was without consequence. However, on the basis of providing direction for the bench and bar, it noted that there was no realistic likelihood that the outcome of the case would have differed, had the tape not been admitted. Moreover, "there is no privilege to testify falsely in the mistaken belief that prior statements will not be disclosed." The court expressed displeasure in the holding it was forced to reach. It also acknowledged the unfairness to McClellan's victim but stated that McClellan's rights were "so severely trodden upon" it was impossible to find otherwise. Reversed and remanded for a new trial. *State v. McClellan*, 2009 UT 50.

Regardless of difficulties, complete restitution must be determined.

Trenton Jones fell asleep while driving and struck Larry Beach's vehicle head-on, resulting in the death of Mr. Beach. Jones was originally charged with automobile homicide, but later pled guilty to negligent homicide. In October 2004, he was ordered to serve 365 days in jail, pay a fine, and complete community service. The determination of restitution was reserved for a future date. In April 2007, the court ordered restitution for medical costs, funeral expenses and damage to the Beach vehicle, totaling $3,355.68. The court denied the request for payment of lost future wages. A wrongful death suit was filed by Beach's widow, concurrently with the criminal proceedings, and settled. The settlement included a release from any past, present or future claims. The State filed a petition for extraordinary writ to challenge the judge's denial of restitution for future wages. It sought an order to direct the judge to hold an evidentiary hearing to determine complete restitution. Jones filed a suggestion of mootness based on the civil suit settlement. The court of appeals certified the appeal to the Utah Supreme Court.

The Utah Supreme Court first addressed the issue of mootness. It held that the release only ended the controversy between Jones and Mrs. Beach. However, the petition before the court on appeal involves the State of Utah and Mr. Jones. Accordingly, the resolution of all civil claims does not affect the criminal proceedings. Additionally, the rehabilitative and deterrent purposes of restitution have not been fulfilled. As such, the suggestion of mootness is denied. The court then turned to the issue of whether the judge's order complied with state law requiring an order of complete restitution. Although the court acknowledge Judge Laycock's opinion on the difficulties of determining complete restitution with incomplete facts, it held that the judge had erred because regardless of the difficulties, the statute commands "that complete restitution be determined" even if that determination is made solely "based on the best information available." However, because the judge provided adequate reasoning for her ruling the court did not find an abuse of discretion. Accordingly, the State's petition was granted and remanded, solely to ascertain complete restitution, but the current order of restitution remains undisturbed. *State v. Laycock*, 2009 UT 53.

Determination of convictions within ten year period is a question of law for the judge to decide.

On September 23, 2004, Robert Palmer was arrested for driving under the influence. A jury trial was held but Palmer did not appear and was tried in absentia. The jury found Palmer guilty. After the defense and prosecution stipulated, the jury was excused and the prosecution presented evidence to the court of Palmer's two prior convictions within the previous ten years. Defense did not object to the evidence but argued that the relevant date for determining conviction should be the plea date, not the sentencing date. The trial court determined that a conviction occurred at the date of sentencing as opposed to the date the guilty plea is entered. As such, the court held that the convictions were within the ten year period and found Palmer guilty of a third degree felony. Prior to sentencing, Palmer's new counsel moved for a new trial and argued that Palmer had a constitutional right to have a jury determine whether the prior convictions fell within the ten year period. After oral arguments, the court acknowledged it had violated Palmer's right but denied the motion for new trial on the basis that the error was harmless. The court then sentenced Palmer. On

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appeal, the majority held that Palmer did not have a federal constitutional right to jury consideration of whether his convictions were within ten years. Certiorari granted.

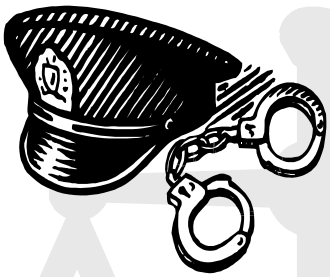
The Utah Supreme Court discussed the rationale behind distinguishing between a jury's role in answering factual questions versus answering questions of law. It found that Palmer "sought to have a jury determine the legal rule governing when his conviction took place." The court determined it was not a factual issue, but rather, a pure question of law. Accordingly, because it was a question of law, Palmer has neither a constitutional nor statutory right to a jury determination on the legal dispute. *State v. Palmer*, 2009 UT 55.

Utah Court of Appeals

Strict compliance to Rule 11 required to accept a guilty plea

James Norman Alexander was charged with rape and forcible sexual assault. Alexander knew the victim from a prior dating relationship and had asked her if he could come to her home. He told her he wanted to have sex with her and although she told him she did not want to have sex with him she agreed to allow him to come to her home. Once at her home Alexander began making sexual advances toward her. She again told him she did not want him but despite her protests Alexander became increasingly aggressive, forcing her to submit to sexual contact and intercourse, without her consent. Under the terms of a plea bargain, Alexander pled guilty to burglary with sexual battery as the lesser included element of the crime. Alexander appealed and argued that the trial court erred in accepting his plea because the record lacked sufficient support to show that he understood the nature and elements of the sexual battery element of the crime and lacked an "actual factual basis to support the plea."

The Utah Court of Appeals stated the burden is "a duty of strict compliance" by the trial court. Moreover, under Rule 11, the trial court cannot accept a guilty plea unless it finds that the defendant understands the nature and elements of the crime he is pleading to and admits all those elements. Strict compliance with Rule 11 "creates a presumption that the plea was knowingly and voluntarily entered." In this case, the court held that the trial court did not strictly comply with Rule 11 because it did not ensure that Alexander understood the elements of the sexual battery offense. The colloquy during the plea hearing was brief and general and the record is devoid of any other information to support that he understood the elements. Accordingly, there is no presumption that the plea was knowingly and voluntarily entered. Reversed and remanded back to the trial court for Alexander to withdraw his guilty plea and for other proceedings as appropriate. *State v. Alexander*, 2009 UT App 188.



Bad acts evidence properly admitted under the rules of evidence.

Azlen Marchet was charged with raping B.F. At trial, the state moved to admit testimony from three witnesses who also alleged to be victims of rape by Marchet. "The State argued that admission of the testimony was proper to show Marchet's intent, preparation, plan, knowledge, absence of mistake or accident, and B.F.'s lack of consent." During the evidentiary hearing, the judge heard from two of the three witnesses and received in transcripts involving the third witness for review. After comparing the testimonies, four factual similarities particularly probative of the issue of consent, were identified by the judge. Accordingly, the court granted the motion to admit testimony of two of the witnesses. At trial, the State informed the jury in its opening statement that testimony from the other women was to show Marchet's 'set plan' and could be considered in deciding if BF consented to the sexual intercourse. And again during closing argument, the prosecutor reminded them that the testimony of the women was for consideration of the consent element of the crime.

Marchet was convicted and appealed. On appeal, he argued that the jury was not properly instructed as to the mental state required for the crime of rape. He also argues that the court erred in failing to give a mistake of fact instruction. And finally, he argues that the court erred by admitting the testimony of the two women who allegedly were prior victims of Marchet.

The appellate court carefully considered the evidence under Rules 404(b), 402 and 403. In so doing, it applied the factors from *State v. Shickles*, 760 P.2d 291, 295-296 (Utah 1988) to assess "the probative value of bad acts

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evidence." Those factors included: "[1] the strength of the evidence as to the commission of the other crime, [2] the similarities between the crimes, [3] the interval of time that has elapsed between the crimes, [4] the need for the evidence, [5] the efficacy of alternative proof, and [6] the degree to which the evidence probably will rouse the jury to overmastering hostility." It mitigated the danger of overmastering hostility by instructing the jury as to the specific and limited purpose of the evidence offered. Accordingly, the court held that the bad acts evidence was properly admitted under the rules of evidence and the trial court did not err in that admission. It further held that defense counsel "did not render ineffective assistance by failing to request a mistake of fact instruction." *State v. Marchet*, 2009 UT App 205.

Failure to consider a continuance when good cause shown was an abuse of discretion.

Stewart Becker was terminated from Sunset City Police Department and provided with a letter that briefly outlined the appeals process. However, it did not contain the important requirement that the Board had to make a decision within fifteen days from the date it received the appeal. Becker filed his appeal on the day immediately following his termination and began to look for an attorney. He made an appointment with an attorney for April 18th, the fourteenth day following his termination. Five days after his termination, Sunset City sent a certified letter to Becker to notify him that the hearing on his appeal was set for April 16th. Attempts at delivery were made but were unsuccessful. On April 13th, Becker talked with a lieutenant who informed him of the hearing date. The letter was subsequently tracked by the city to the post office where it remained undelivered. At the hearing, Becker immediately stated that he'd only recently received notice and requested a new hearing so he could arrange for counsel. The Board, for the first time, advised him of the fifteen-day decision deadline. Becker proceeded with the hearing but stated that, "the attorney was, was critical to me." Becker's

termination was affirmed. Becker requests a review of the Board's decision and argues that his "due process right to notice and a meaningful opportunity to be represented by counsel had been violated" when the Board refused to grant him a continuance.

The court referred to *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306 (1950), and reasoned that at a minimum, due process required "timely notice and opportunity for hearing." It further stated from *Mullane* that "for notice to satisfy due process requirements, it must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" and "a reasonable time ... to make their appearance." The court also noted that the Board had authority to grant a continuance if good cause was shown. Accordingly, the court held that the Board abused its discretion when it failed to consider a continuance based on the fact that Becker had immediately sought an attorney, the certified letter had not been delivered, and Becker had expressed his desire for a continuance so he could have counsel present. The decision affirming the termination is set aside and the Board is directed to hold a new hearing and to begin its consideration 'entirely anew' without regard to any evidence or statements made at the first hearing. *Becker v. Sunset City*, 2009 UT App 197.

Waiver of governmental immunity for negligence based on a breach of standard of care.

Michael Willden was riding his motorcycle with a group of others on a state road in Duchesne County. County Sheriff's Deputy Monte May passed the group at a high rate of speed while responding to a medical emergency. Willden tried to pull over but lost control and was injured in the crash. Willden sued the County claiming that May was negligent in his conduct and that accordingly, the County was liable. The County moved for summary judgment claiming it retained governmental immunity when an emergency vehicle was operated in accordance with Utah Code 41-6a-212. Willden further argued that Utah Code 41-6a-212 required emergency vehicle operators to act "as a reasonably prudent emergency vehicle operator in like circumstances." The district court granted the county's motion finding May was operating an emergency

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vehicle in accordance with the statute and as such, the County retained its governmental immunity under the GIAU. The court rejected Willden's argument. Willden appeals.

The court of appeals acknowledged the undisputed fact that May was operating his vehicle with proper lights and sirens. The question before the court is whether the statute contains an additional requirement that "emergency vehicle operators act as reasonably prudent emergency vehicle operators under like circumstances, such that a failure to do so waives immunity under the GIAU." The court recognized that in 2004, the legislature reinserted a standard of care into Utah Code 41-6a-212, and interpreted that revision as clearly intending to impose a waiver of governmental immunity for negligence based on a breach of that standard of care. Since Willden claims such a breach has occurred creating a question of fact, the trial court erred in concluding that the County retained governmental immunity. The district court's entry of summary judgment is reversed and remanded for further proceedings. *Willden v. Duchesne County*, 2009 UT App 213

Other Circuits

DA's office held liable for failure to train on Brady

The defendant was convicted of attempted armed robbery. When he was tried for capitol murder a few weeks later, he decided not to testify to avoid impeachment by his conviction. Fourteen years later they discovered a lab report in the robbery case that exonerated the defendant. The robbery conviction was vacated, and the murder conviction was reversed. The defendant was acquitted of the murder on retrial and sued the District Attorney in his official capacity under 42 USC 1983.

The jury returned a $14 Million verdict under the theory that the office was deliberately indifferent to the need to train assistants on their Brady obligations. An evenly divided en banc 5th circuit upheld the verdict. As pointed out by Chief Judge Jones in his dissent, we now have the anomalous situation where a supervisory prosecutor has absolute immunity in his or her personal capacity for a failure to train under *Van De Kamp v. Goldstein*, 129 S.Ct. 855 (2009), but no immunity for the office. *Thompson v. Connick*, --- F.3d ----, 2009 WL 2424566 (5th Cir. 2009).

Warrant for search of a computer requires a specific computer search authorization

Officers believed that Payton was selling drugs and obtained a search warrant to search his home for evidence of drug sales, including any financial records. The issuing judge neglected to specifically include authorization in the warrant for a computer search for such records, even though the requesting affidavit contained a reference to computer searches and the judge later stated that it was his intent to do so. While searching Payton's home, an officer located a computer that was in sleep mode. The officer moved the cursor, awakening the computer. The officer saw a file name that appeared to reference child pornography, and which did contain an image of child pornography. A search of the computer revealed other illegal images. Payton was convicted of possession of child pornography.

The Ninth Circuit Court of Appeals stated that searches of computers are far more intrusive than other kinds of document searches. The court discounted the fact that the issuing judge acknowledged that he had made a mistake, noting that the purpose of a warrant was to advise the searching officers precisely where they may search. Thus, a specific authorization must be included in the search warrant if officers wish to search computers located on the premises to be searched. *United States v. Payton*, 573 F.3d 859 (9th Cir. 2009).

Removing bag from bus compartment creates illegal seizure

Officers inspected the luggage compartment of a Greyhound bus and noticed that a bag's computer-generated label had been altered by hand. Finding this to be suspicious, the officers removed the bag. After determining that the driver was not ready to depart and obtaining the driver's consent to board the bus, the officers boarded the bus and asked which passenger owned the bag. Alvarez-Manzo (traveling under the false name of Perez) claimed ownership. Alvarez-Manzo claimed that he did not have any ID. However, an officer could see a bulging wallet in his pants pocket. The officer searched the wallet with Alvarez-Manzo's permission and discovered the baggage claim ticket. The officers handcuffed Alvarez-Manzo and retrieved a drug detector dog from a nearby police car. The dog gave a positive final response to the bag. A search warrant was obtained and executed and officers found 10 kilos of cocaine in the bag. Alvarez-Manzo claims that his bag was seized by the officers without a warrant, consent or reasonable suspicion. In *United States v. Va*

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Lerie, 424 F.3d 694 (8th Cir. 2005) (en banc), the court established a test to determine whether law enforcement's detention of property entrusted to a third-party common carrier creates a seizure. A seizure of checked baggage occurs when the detention does any of the following: (1) "delays a passenger's travel or significantly impacts the passenger's freedom of movement," (2) "delays the checked luggage's timely delivery," or (3) "deprives the carrier of its custody of the checked luggage." In *United States v. Va Lerie*, the officers removed the baggage at the request of the bus carrier, and not of the officer's own volition.

The court held that the officers seized Alvarez-Manzo's bag by removing it from the bus for their own investigative purposes. There was not reasonable suspicion to support the

seizure and the evidence of the cocaine was ordered suppressed. It seems clear that the case would have had a different outcome, insofar as justifying the seizure, had the drug dog sniffed the bag prior to seizure. However, there may be many reasons that such a course of action was not possible or advisable in this case. *United States v. Alvarez-Manzo*, 570 F.3d 1070 (8th Cir. 2009).

Suspect not seized merely by officers' questioning or momentary compliance with show of authority

Two officers spotted Smith walking through a high-crime area at 0300. The officers drove alongside Smith and asked to speak with him. Smith stopped walking and turned at a 45 degree angle towards the car, seemingly agreeing to speak with the officers. An officer asked if Smith had any identification, to which he replied no. The officer asked Smith where he was heading and he replied he was going to "his girl's house." The officer asked the address of Smith's girl's house and Smith repeated, "I am heading to my girl's house." The officer asked the same question again and Smith gave the same answer. The officer then asked Smith to put his hands on the hood of the patrol car so the officers could "speak with him further." Smith took a couple of steps toward the car. The officers opened the car doors and Smith fled. As Smith ran, he dropped a gun. The officers caught Smith. He was also holding a gram of cocaine.

The district court found that Smith was seized, either by the officer's repeated questions about the girl's address, or when Smith turned toward the car and momentarily submitted to the officers' authority. In *California v. Hodari D.*, 499 U.S. 621 (1991), the Supreme Court held that an officer's order to stop may not necessarily create a Fourth Amendment seizure.

The court of appeals reversed the trial court and held that Smith was not seized, either by the officer's "show of authority" through the questioning, or by Smith's "momentary compliance" with the officer's command. The court stated that submission to authority under *Hodari D.*, "requires at minimum, that a suspect manifest compliance with police orders." "Two steps towards the hood of a car does not manifest submission to the police officers' show of authority." Furthermore, the officers' questioning could not amount to seizure because Smith never

responded in a way that was "clearly a refusal to engage" in conversation. The court noted that the "two officers were still in their car, neither officer displayed his weapon, there was no physical touching, and no indication as to the language or tone of the officer's voice that might have signaled a clear show of authority. Under the totality of the circumstances, Smith was not seized for Fourth Amendment purposes when the officer repeatedly asked the question, 'Where is your girl's house?'" Once again, *"talking nice while thinking mean"* contributed to ruling that there was no seizure. Because Smith was not seized prior to dropping the gun, his arrest was lawful and the gun and cocaine were admissible as evidence against him. *United States v. Smith*, 575 F.3d 308 (3rd Cir. 2009).

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Roadblock to deter poaching found to be constitutional

National Park rangers set up a vehicle checkpoint at the entrance to the Kings Canyon National Park to "mitigate the illegal taking of animals in the park" due to illegal hunting in the national park. Rangers stopped all cars for about 15 to 25 seconds, and spoke with drivers about illegal hunting. As a ranger spoke with Fraire at the checkpoint, he detected the strong odor of alcohol on Fraire's breath. Fraire was charged with driving under the influence and related offenses. Fraire claimed that the checkpoint was unconstitutional.

The court of appeals held that the checkpoint complied with the rule established in *Illinois v. Lidster*, 540 U.S. 419 (2004). In *Lidster*, the Supreme Court ruled that brief suspicionless vehicle checkpoints designed to gather information, rather than as a general crime-control measure, are lawful. A court must consider "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." The court of appeals held that the evidence showed that there was a significant poaching problem within the park. "The checkpoint was closely related to addressing this problem because it was structured to catch poachers, to deter would-be poachers, and to educate park visitors about the hunting prohibition." Overall, the court opined that the checkpoint was constitutional because, "the gravity of the public concerns served by the checkpoint was high, the checkpoint was reasonably related to these concerns, and the severity of the interference with individual liberty was minimal." *United States v. Fraire*, 575 F.3d 929 (9th Cir. 2009).

Other States

Search incident to arrest pursuant to a warrant arrest found unconstitutional under *Gant*

An officer saw Henning inside a store. After confirming his belief that there was an arrest warrant outstanding for Henning, the officer asked Henning to step out of the passenger side of a car that he had just entered and the officer arrested him on the warrant. The car was registered to Henning. The officer searched the car incident to arrest and found drug paraphernalia that later tested positive for amphetamine. The officer relied on a Kansas statute that allowed search incident to arrest of a vehicle for "evidence of a crime." A

Kansas Supreme Court decision, *State v. Anderson*, 910 P.2d 180 (Kan. 1996), had earlier held that the search incident to arrest must be limited to a search for evidence of the crime for which the person was arrested. A more recent state statute expanded the search authority to allow a search for evidence of any crime.

Henning relied on the recent case of *Arizona v. Gant* to claim that the search of his car was illegal. In one of the first post-*Gant* decisions, the Kansas high court agreed with Henning and held that the search was illegal. A Kansas statute that authorizes police officers to search an arrestee and the area immediately around him for evidence of "a crime" violates the Fourth Amendment, the Kansas Supreme Court held June 26. The U.S. Supreme Court recently made clear in *Arizona v. Gant*, 85 CrL 95 (U.S. 2009), that the search-incident-to-arrest exception to the warrant requirement allows police to search the area within reach of an arrestee only to protect themselves or to find evidence that relates to the offense of arrest. In *Arizona v. Gant*, the U.S. Supreme Court held: "If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." At the time of the search, Henning was secured in handcuffs and standing several feet away from the car. "To have a valid search incident to arrest, when there is no purpose to protect law enforcement present, the search must seek evidence to support the crime of arrest, not some other crime, be it actual, suspected, or imagined." The Kansas court held that the state statute authorizing a search incident to arrest is unconstitutional insofar as it purports to allow a search for evidence of a crime other than the crime for which the suspect was arrested. Applying the *Gant* ruling, the court ordered that the drug evidence be suppressed. *State v. Henning*, 209 P.3d 711 (Kan. 2009).

End of **BRIEFS**

Kris Neal is named as the new Assistant Director of the Law Enforcement Coordinating Committee (LECC) / Victim-Witness Staff, U.S. Attorney's Office

Kris Neal has been selected as the Assistant Director of the LECC/Victim-Witness Staff. As many of you know, Kris has served as the Staff's Attorney Advisor for more than two years. The Law Enforcement Coordinating Committee (LECC)/Victim-Witness Staff serves as EOUSA's liaison to the Law Enforcement Coordinators and Victim-Witness Coordinators in the United States Attorneys' Offices. The staff provides information, training, guidance, and technical assistance to United States Attorneys' Offices on Department priorities and initiatives in the areas of law enforcement coordination, victims' services, witness management, resources, and special projects. The staff oversees a number of programs including the Emergency Witness Assistance Program, the United States Attorneys' Weed and Seed Fund, the Federal Crime Victim Assistance Fund, and other Office for Victims of Crime-funded programs.

Prior to joining the LECC/Victim-Witness Staff, Kris was the Chief City Prosecutor for the Layton City Attorney's Office in Layton, Utah, with a caseload emphasis on domestic violence. In that position, she worked closely with the Layton City Victim Advocate Office and with the Layton Police Department, providing advice and training on criminal legal issues. Kris has excellent policy and management experience as well, having served as Chair of the Second Judicial District's Victims' Rights Committee and as President of the Utah Municipal Prosecutors Association.

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Visit the UPC online at

www.upc.utah.gov

On the Lighter Side

APOLOGY - In the July issue of *The Utah Prosecutor* we printed a joke in the "On The Lighter Side" section which included what may be construed as an inappropriate implication about priests and which may have caused offense to some. Such was certainly not the intent of the joke's inclusion. I very sincerely apologize for any offense we may have caused.

~ Mark Nash, Director

RED MARBLES

I was at the corner grocery store buying some early potatoes. I noticed a small boy, delicate of bone and feature, ragged but clean, hungrily appraising a basket of freshly picked green peas. I paid for my potatoes but was also drawn to the display of fresh green peas. I am a pushover for creamed peas and new potatoes. Pondering the peas, I couldn't help overhearing the conversation between Mr. Miller (the store owner) and the ragged boy next to me.

'Hello Barry, how are you today?'

'H'lo, Mr. Miller. Fine, thank ya. Jus' admirin' them peas. They sure look good.'

'They are good, Barry. How's your Ma?'

'Fine. Gittin' stronger alla' time.'

'Good. Anything I can help you with?'

'No, Sir . Jus' admirin' them peas.'

'Would you like to take some home?' asked Mr. Miller.

'No, Sir. Got nuthin' to pay for 'em with.'

'Well, what have you to trade me for some of those peas?'

'All I got's my prize marble here.'

'Is that right? Let me see it' said Miller.

'Here 'tis. She's a dandy.'

'I can see that. Hmmmmm, only thing is this one is blue and I sort of go more for red. Do you have a red one like this at home?' the store owner asked.

'Not zackley but almost..'

'Tell you what. Take this sack of peas home with you and next trip this way let me look at that red marble'. Mr. Miller told the boy.

'Sure will. Thanks Mr. Miller.'

Mrs. Miller, who had been standing nearby, came over to help me. With a smile she said, 'There are two other boys like him in our community; all three are in very poor circumstances. Jim just loves to bargain with them for peas, apples, tomatoes, or whatever. When they come back with their red marbles, and they always do, he decides he doesn't like red after all and he sends them home with a bag of produce for a green marble or an orange one, when they come on their next trip to the store.' I left the store smiling to myself, impressed with this man. A short time later I moved to Colorado, but I never forgot the story of this man, the boys, and their bartering for marbles.

Several years went by, each more rapid than the previous one. Just recently I had occasion to visit some old friends in that Idaho community and while I was there learned that Mr. Miller had died. They were having his visitation that evening and knowing my friends wanted to go, I agreed to accompany them.

Upon arrival at the mortuary we fell into line to meet the relatives of the deceased and to offer whatever words of comfort we could. Ahead of us in line were three young men. One was in an army uniform and the other two wore nice haircuts, dark suits and white shirts...all very professional looking. They approached Mrs. Miller, standing composed and smiling by her husband's casket. Each of the young men hugged her, kissed her on the cheek, spoke briefly with her and moved on to the casket. Her misty light blue eyes followed them as, one by one, each young man stopped briefly and placed his own warm hand over the cold pale hand in the casket. Each left the mortuary awkwardly, wiping his eyes.

Our turn came to meet Mrs. Miller. I told her who I was and reminded her of the story from those many years ago and what she had told me about her husband's bartering for marbles. With her eyes glistening, she took my hand and led me to the casket. 'Those three young men who just left were the boys I told you about. They just told me how they appreciated the things Jim 'traded' them. Now, at last, when Jim could not change his mind about color or size.... they came to pay their debt.' 'We've never had a great deal of the wealth of this world,' she confided, 'but right now, Jim would consider himself the richest man in Idaho.'

With loving gentleness she lifted the lifeless fingers of her deceased husband. Resting underneath were three exquisitely shined red marbles.

The Moral: We will not be remembered by our words, but by our kind deeds.

DO YOU HAVE A JOKE, HUMOROUS QUIP OR COURT EXPERIENCE? We'd like to hear it! Please forward any jokes, stories or experiences to Marlesse Whittington, Editor, at mwhittington@utah.gov.

Submission does not ensure publication as we reserve the right to select the most appropriate material available and request your compliance with copyright restrictions. Thanks!

2009/2010 Training Calendar

Utah Prosecution Council (UPC) And Other Utah CLE Conferences

October 21-23	GOVERNMENT CIVIL PRACTICE CONFERENCE *Training for those who keep the Commission and Council happy*	Moab Valley Inn Moab, UT
November 3-5	JOINING FORCES: PREVENTION, INVESTIGATION, PROSECUTION AND TREATMENT OF CHILD ABUSE *Sponsored by Prevent Child Abuse Utah (UPC is a co-sponsor)*	Davis Co Conf Ctr Layton, UT
November 11-13	COUNTY/DISTRICT ATTORNEYS EXECUTIVE SEMINAR *Executive discussion and training for the bosses and their chief deputies*	Dixie Center St. George, UT
November 18-20	ADVANCED TRIAL SKILLS TRAINING – CHILD SEX ABUSE CASES *The third annual advanced trial skills training for experienced prosecutors*	West Jordan, UT
April 22-23, 2010	SPRING CONFERENCE *Case law update, legislative update and more*	Larry Miller Campus Sandy, UT

National College of District Attorneys (NCDA) and American Prosecutors Research Institute (APRI)

October 24-28	THE EXECUTIVE PROGRAM - NCDA* *Designed specifically for elected prosecutors and chief deputies*	Myrtle Beach, SC
Oct. 31 - Nov. 4	NATIONAL CONFERENCE ON DOMESTIC VIOLENCE - NCDA*	San Antonio, TX
November 8-12	PROSECUTING HOMICIDE CASES - NCDA*	San Francisco, CA
December 6-10	FORENSIC EVIDENCE - NCDA*	San Diego, CA
December 6-10	PROSECUTING SEXUAL ASSAULTS - NCDA*	Washington, DC

For a course description and on-line registration for this course, click on the course title (if the course title is not hyperlinked, the sponsor has yet to put a course description on line) or call Prosecution Council at (801) 366-0202 or e-mail: mnash@utah.gov. To access the interactive NCDA on-line registration form, click on 2009 Courses.

NAC SCHEDULE—*page 16*

National Advocacy Center (NAC)

A description of and application form for NAC courses can be accessed by clicking on the course title or by contacting Utah Prosecution Council at (801) 366-0202; E-mail: mnash@utah.gov.

Restoration of federal funding for the NAC is still being sought. In the meantime, NDAA continues to offer courses at the NAC, albeit without reimbursement of expenses. Students at the NAC will be responsible for their travel, lodging and partial meal expenses.
For specifics on NAC expenses click here.

All courses are subject to cancellation and dates are subject to change. Applicants will be notified of any changes as early as possible. Click here to access the NAC on-line application form.

January 26-29, 2010	COURTROOM TECHNOLOGY *The electronic litigator from case analysis/prep to courtroom* Application deadline: November 6, 2009	NAC Columbia, SC
December 7-11 February 1-5, 2010 March 15-19, 2010	TRIAL ADVOCACY I *A practical, hands-on training course for trial prosecutors* Application deadlines: Dec. course is Sept 25th, Jan. course is Nov. 20th, March course is Jan. 8th.	NAC Columbia, SC
January 11-15, 2010 February 8-12, 2010	BOOT CAMP: AN INTRODUCTION TO PROSECUTION *A course for newly hired prosecutors* Application deadlines, Jan. course is Oct. 30th, Feb. course is Dec. 4th.	NAC Columbia, SC
February 21-26, 2010	CHILD PROOF: ADVANCED TRIAL AD FOR CHILD ABUSE PROSECUTION *Intensive course for experienced child abuse prosecutors* Application deadline: Dec. 11th.	NAC Columbia, SC
March 1-5, 2010	UNSAFE HAVENS II *Prosecuting on-line crimes against children* Application deadline: Dec. 18th.	NAC Columbia, SC
March 22-26, 2010	TRIAL ADVOCACY II *Practical instruction for experienced trial prosecutors* Application deadline: Jan. 15, 2010.	NAC Columbia, SC
March 29- April 1	CROSS EXAMINATION *A complete review of cross examination theory and practice* Application deadline: Jan. 22, 2010.	NAC Columbia, SC